`IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1164 of 2006
With
CRIMINAL MISC.APPLICATION No. 2575 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DILIP SHANTILAL TRIVEDI & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :
MR PS CHAMPANERI for Applicant(s) : 1 - 2.
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR DC SEJPAL for Respondent(s) : 2,
RULE SERVED for Respondent(s) : 3 - 4.
MR TS NANAVATI for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 05/07/2007

COMMON ORAL JUDGMENT

1. As both these applications are arising out of the same Criminal Case, they are being disposed

of by this common judgment and order.

2. Special Criminal Application No. 1164 of 2006 is filed by the applicants – original accused Nos.3 and 4 and Criminal Misc. Application No. 2575 of 2007 is filed by the applicant – original accused No.5 under Section 482 of the Criminal Procedure Code to quash and set aside the complaint being Criminal Case No. 925/2004 pending in the Court of learned Metropolitan Magistrate, Court No.9, Ahmedabad.

3. The Borsad Urban Cooperative Credit Society Limited – original complainant through its Manager has filed Criminal Case No. 2185 of 1999 in the Court of learned Metropolitan Magistrate, Court No.9, Ahmedabad against the respective applicants as well as other co-accused for the offence punishable under Section 138 r.w. Sections 141 and 142 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the Act” for short) alleging inter alia that

the original accused No.1 is a company; accused No.2 is the Chairman and Managing Director of the company; accused Nos.3 and 4 are the Directors of the company and the accused No.5 is Chief Executive of the said company. It is submitted in the said Criminal Case that Cheque No. 277124 dated 22.3.1999 was issued for an amount of Rs. 25,00,000/- in favour of the complainant and when the said cheque was deposited in their bank, the same was returned with the endorsement "***insufficient fund***" on 22.3.1999. It is alleged in the complaint that the intimation was received from the bank on 23.3.1999 and thereafter statutory notice as contemplated under Section 138 of the Act was issued on 5.4.1999 and inspite of the service of the statutory notice, the amount mentioned in the aforesaid cheque has not been paid and therefore, it is alleged that the applicants as well as other accused have committed offence under Section 138, r.w. Section 141 and 142 of the Act. That the learned trial Court issued the summons by order dated 9.5.1999 therefore, the

respective applicants have preferred the present applications under Section 482 of the Criminal Procedure Code to quash the complaint being aforesaid Criminal Case in exercise of the powers under Section 482 of the Criminal Procedure Code.

4. Shri P.S.Champaneri, learned advocate appearing for the applicants of Special Criminal Application No. 1164 of 2006 has vehemently submitted that when the applicants are alleged to have committed offence punishable under Section 138 r.w. Section 141 of the Act, there are no allegations in the complaint holding the applicants responsible and/or liable. It is also further submitted that the relevant averments constituting the offence under Section 141 of the Act are lacking in the complaint. It is also further submitted that there are no clear allegations in the complaint against the applicants to the effect that the applicants were in-charge of the affairs of the company at the relevant time. It is also further submitted

that the allegations in the complaint do not satisfy the ingredients of Section 141 of the Act and therefore, process issued against them are required to be quashed and set aside. Shri Champaneri, learned advocate appearing for the applicants has relied upon the decision of the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD. V/s. NEETA BHALLA & ANOTHER*** reported in **2005 (8) SCC 89** as well as subsequent decision of the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD. V/s.NEETA BHALLA & ANOTHER*** reported in **2007(3) SCALE 245** in support of his prayer to quash the Criminal complaint / case.

5. Shri T.S.Nanavati, learned advocate appearing for the applicant of Criminal Misc. Application No. 2575 of 2007 – original accused No.5 has submitted that so far as original accused No.5 is concerned, much prior to the issuance of the cheque in question, he has already resigned and his resignation was accepted by the resolution of the company in its meeting of the Board of

Directors held on 1st December, 1998. He has also further submitted that in fact, even the bank was also informed about the resignation of the original accused No.5. He has also further submitted that even otherwise, in the complaint, there are no averments / allegations holding the applicant vicariously liable and the allegations in the complaint do not satisfy the ingredients of Section 141 of the Act. He has also relied upon the decision of the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD.*** (supra) referred to hereinabove.

6. Shri D.C.Sejpal, learned advocate appearing for the original complainant while opposing the present application has submitted that considering the averments and the allegations in the complaint, when the learned trial Court has issued the summons, the same is not required to be interfered with in exercise of the powers under Section 482 of the Criminal Procedure Code. He has submitted that whether the applicants were in-charge and in day today

management of the accused No.1 company or not is a question of evidence and at this stage, the same is not required to be considered and therefore, it is requested to dismiss both the applications.

7. Shri Kodekar, learned APP has requested to pass an appropriate order considering the averments in the complaint.

8. Heard the learned advocates appearing for the respective parties.

9. On bare reading of the complaint, more particularly, in para – 2 of the complaint, it is stated that the original accused No.1 is a company; original accused No.2 is the Chairman & Managing Director of the company; original accused Nos.3 and 4 (applicants of Special Criminal Application No. 1164 of 2006) were the Directors and the original accused No.5 (applicant of Criminal Misc. Application No.

2575 of 2007) was the Chief Executive of the original accused No.1 company. Except the said averments in paragraph – 2, there are no allegations and/or averments against the original accused Nos. 3, 4 and 5 to the effect that they were in-charge of the original accused No.1 company and/or they were in active management of the company. The allegations against the applicants herein, original accused Nos.3, 4 and 5 are for the offences under Section 138 r.w. Section 141 of the Act and the applicants are to be held vicariously liable under Section 141 of the Act. There are no other averments and/or allegations against the applicants that they were in-charge of the management of the company. As held by the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD.*** (supra), it is necessary to aver in a complaint under Section 141 that at the time when the offence was committed, the present accused were in-charge of and responsible for the conduct and business of the company. As held by the Hon'ble Supreme Court,

the said averment is an essential requirement of Section 141 and has to be made in a complaint and without this averment being made in a complaint; the requirement of section 141 cannot be said to be satisfied. It is also further observed by the Hon'ble Supreme Court that merely being a Director of the company is not sufficient to make the person liable under Section 141 of the Act. The requirement of Section 141 is that person sought to be made liable should be in-charge of and responsible for the conduct and the business of the company at the relevant time and this has to be averred in the complaint as a fact as there is no deemed liability of a Director in such case. Now, looking to the averments and the allegations in the complaint, it is not averred that the applicants as a Director were in-charge of the company. Thus, on bare perusal of the complaint, the allegations in the complaint do not satisfy the ingredients of Section 141 of the Act by which the accused Nos. 3, 4 and 5 can be held vicariously liable under Section 141 of the Act.

Under the circumstances, the complaint being Criminal Case No. 925 of 2004 requires to be quashed and set aside qua original accused Nos. 3, 4 and 5. There is one additional ground also in favour of the original accused No. 5 to quash and set aside th summons issued against him. The cheque in question was issued on 22.3.1999 and much prior thereto, the original accused No.5 has already resigned from the company and the said resignation was accepted / approved by the Board of the Directors in its meeting held on 1st December, 1998 and even the intimation of the same was also communicated to the bank. Thus, at the time when the cheque was issued, the original accused No.5 was not even working with the company.

10. For the reasons stated above, both the applications are allowed. The summons issued by the learned Metropolitan Magistrate, Court No.9, Ahmedabad against the applicants – original accused Nos. 3, 4 and 5 in Criminal Case No. 2185 of 1999 now registered as Criminal Case No.

925 of 2004 against the applicants – original accused Nos. 3, 4 and 5 are hereby quashed and set aside. The complaint against rest of the accused be continued and proceeded further in accordance with law and on its own merits. Rule is made absolute in each of the application.

[M.R.Shah, J.]

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